FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY,

Petitioner,

v.

HAROLD WHORTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

PAUL G. TOBIN
Jefferson District Public Defender
of Counsel

TERRENCE R. FITZGERALD
Chief Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO • (202) 393-0625

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BRIEF FOR RESPONDENT

JURISDICTION

On July 25, 1978, the Kentucky Supreme Court rendered an opinion reversing the conviction of the respondent. On October 10, 1978, a timely petition for rehearing and modification was denied. On January 8, 1979, the Petition for Writ of Certiorari was granted. Jurisdiction was invoked pursuant to 28 U.S.C. § 1257(3).

On February 27, 1979, the Supreme Court of Kentucky rendered an unanimous opinion in *Watson v. Commonwealth of Kentucky*, File No. 78-SC-300-MR, which held unequivocally that the *Whorton*

ruling was a matter of state law. The Kentucky Supreme Court determined that the court would not "engage in the mental gymnastics inherent in the application of the harmless error doctrine." On the basis of this decision, the respondent subsequently filed a memorandum with this Court suggesting that, in light of the decision in *Watson*, the case at bar should be dismissed for lack of jurisdiction or mootness. This Court passed this issue to the merits of the case.

CONSTITUTIONAL PROVISIONS

ARTICLE III

Section II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exception and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

FOURTEENTH AMENDMENT

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

WHETHER THE SUPREME COURT OF KENTUCKY MISINTERPRETED AND MISAPPLIED THE PRIOR DECISION OF THIS COURT IN *TAYLOR V. KENTUCKY*?

SUPPLEMENTAL STATEMENT OF THE CASE

Harold Whorton was charged in three separate indictments with the commission of armed robberies which occurred at Krispy Kreme Doughnut Shop,

Burger Chef and Jerry's Restaurant, and with two counts of wanton endangerment [Transcript of Record, hereinafter referred to as TR (157391) 2-5; TR (157406) 2; TR (157667) 2-3.] The three indictments were assigned to the same day for trial by a jury. Under Kentucky law, the jury ordinarily determines guilt or innocence and assesses any punishment to be imposed in a unitary proceeding. However, defense counsel tendered a written pre-trial motion to allow the jury to first determine the question of guilt and to determine the sentence to be imposed in a separate proceeding if guilt was found. The purpose of this proposal was to allow the introduction of additional evidence on punishment alone to aid the jury in making an informed judgment on sentencing [TR (157391) 36; TR (157406) 9; TR (157667) 26]. In support of his motion for bifurcation, counsel for the defense filed a memorandum of authorities and a series of newspaper articles which demonstrated Whorton's background as a soldier of recognized valor in the Korean War (TR (157391) 36-39; TR (157406) 9-12; TR (157667) 26-30]. During the trial, this motion was renewed by means of a motion for mistrial for failure to bifurcate the proceedings (Transcript of Evidence, hereinafter referred to as TE 172-173). All of these motions were overruled by the court [TR (157391) 36; TR (157406) 9; TR (157667) 26; TE 170, 173]. Defense counsel also filed a written pre-trial motion to elect, in which he requested the court to proceed under either 157391, 157406 or 157667 or that the cases be tried separately [TR (157391) 35]. The purpose of this motion was to permit Whorton to present a factual defense to the two earlier indictments without waiving his privilege

against self-incrimination with respect to the most recent robbery (TE 172-173). This motion was also overruled by the court.

At the conclusion of the evidence, the trial court read and presented to the jury a total of twenty separate instructions and thirty-two form verdicts (Appendix 17-40). [Under Kentucky law, these instructions are presented to the jury orally before closing arguments and are furnished to the jury in writing for use during deliberations.] The trial court also rejected five simple instructions tendered by defense counsel relating to the burden of proof, the presumption of innocence, reasonable doubt and related matters (Appendix 8-11). At the close of its deliberations, the jury found Whorton guilty of all charges and imposed a maximum penalty for each crime. On September 29, 1977, the trial court entered judgment in accordance with the verdict sentencing Whorton to two hundred years for ten robberies, twenty years for two attempted robberies, and ten years for two charges of wanton endangerment. The wanton endangerment convictions were held by the Kentucky Supreme Court to have merged into the robbery convictions. The remaining convictions were reversed for a new trial because the jury was not given the requested instruction on the presumption of innocence.

ARGUMENT

THE SUPREME COURT OF KENTUCKY CORRECTLY INTERPRETED AND APPLIED THE PRIOR DECISION OF THIS COURT IN *TAYLOR V. KENTUCKY*.

The petitioner contends that the Kentucky Supreme Court misinterpreted and misapplied the holding of this Court in *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). Specifically, the petitioner states, on page 5 of its brief:

> The Supreme Court of Kentucky has misinterpreted and misapplied a prior decision of this court, *Taylor v. Kentucky*, 436 U.S. 478 (1978), to the instant case. That court has interpreted *Taylor v. Kentucky* "to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." 570 S.W.2d, at 633. This interpretation requires automatic reversal in every such case regardless of the circumstances of the case or the evidence adduced at trial. The petitioner respectfully submits that such an interpretation of *Taylor v. Kentucky* is incorrect.

Further, the petitioner contends that *Taylor* is limited to its own facts and does not establish a broad constitutional principle. In the alternative, the petitioner urges that, if *Taylor* is held to a standard of constitutional significance, it should be subject to the harlmess-error rule as enunciated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). In view of the judicial history of this issue, especially as it applies in Kentucky, the petitioner is clearly in error.

A. STATE PROCEEDINGS

The Supreme Court of Kentucky held in the case at bar that *Taylor* enunciated a constitutional principle of general applicability and declined to speculate whether the principle was subject to the harmless error rule. The applicability of the harmless error doctrine to this issue was thoroughly presented by the petitioner to the Kentucky Supreme Court in a Petition for Rehearing and Modification, which was denied on October 10, 1978. Moreover, the state court demonstrated its agreement with *Taylor* by amending state procedural rules to require a presumption of innocence instruction in *every* criminal case, whether requested or not. (Kentucky Rules of Criminal Procedure 9.56, effective July 1, 1978).

On February 27, 1979, the Kentucky Supreme Court rendered an opinion in *Watson v. Commonwealth*, File No. 78-SC-300-MR, which reversed a conviction due to the trial court's failure to comply with *Whorton*. In an unanimous opinion, the court clarified its position in *Whorton* and stated:

> In Whorton, supra, we elected as a matter of state law not to engage in the mental gymnastics inherent in the application of the harmless error doctrine. We chose simple prophylaxis over Talmudic hair splitting . . . We perceive no reason to retreat from Whorton, supra.

Thus, it appears that the Supreme Court of Kentucky elected from the outset to create a uniform state procedural requirement that such an instruction be given in order to avoid the problems which it might otherwise face in attempting to apply a harmless error

rule on a case by case basis. Additionally, the Kentucky Supreme Court has summarily reversed all pending convictions in which the *Taylor-Whorton* error was raised. *Watson*, therefore, indicates that the Supreme Court of Kentucky is unwilling as a matter of state law to devote its energies to the application of a harmless error test. By this action, the court has achieved its stated objective of minimizing the impact of *Taylor* without any appreciable expenditure of scarce judicial resources.

B. MOOTNESS AND LACK OF JURISDICTION

Article III of the United States Constitution establishes that the judicial power of the federal courts extends only to such questions as arise in a "case or controversy." In *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937), the Court defined "case or controversy" as a "real and substantial controversy" which must be "definite and concrete." Chief Justice Hughes distinguished a "justiciable controversy" from one which is "hypothetical," "academic or moot." See also *Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964). In *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), justiciability is defined as a "legal concept with a fixed content or susceptible of scientific verification. Its utilization is the result of many subtle pressures . . . " This interpretation is further elucidated in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), where the Court concluded that the words "case or controversy" have an "iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." Moreover, in determining justiciability, the Court's analysis suggests that there is no justiciable controversy (1) where the parties seek an advisory opinion, (2) *where the question sought to be adjudicated has been mooted by subsequent developments*, or (3) where there is no standing to maintain the action. *Flast v. Cohen, supra* at 88 S.Ct. 1950 (emphasis added). Cf. *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); Wright, § 12 *Law of Federal Courts*, 2dEd. (1970).

In *Ashcraft v. State of Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1943), the Court determined that its responsibility in disposing of cases must be dictated by that which "justice may require." Moreover, "in determining what justice does require, the Court is bound to consider any change, either in fact in law, which has supervened since the judgment was entered." See also *Patterson v. Alabama*, 294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082 (1935). This search for justiciability has led to several well-established principles whose origins far antedate the holdings in *Flast* or *Aetna Life*. Indeed, as early as 1872, it was a settled rule that, "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, [Supreme Court] jusridiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Klinger v. State of Missouri*, 80 U.S. 257, 13 Wall. 257, 20 L.Ed. 635 (1872); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

Thus, the Court's power of judicial review is subject to restrictions drawn both by Article III and by self-imposed judicial restraint. In *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945), the Court concluded, at 65 S.Ct. 463:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Cf. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977); *Williams v. Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945). Also, in *Black v. Cutter Laboratories*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed.2d 1188 (1956), the Court noted that, to evaluate whether an opinion rests on adequate state grounds, it must look beyond the "broad sweep of the language" to find the precise grounds on which the judgment rests. "This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." Id. at 76 S.Ct. 827.

Furthermore, where the Court finds it unnecessary to decide any federal question, and where it appears that the judgment below rests on an independent and adequate state ground, the proper course is to dismiss the Writ of Certiorari as improvidently granted, if one has been issued. *Zacchini, supra; Aikens v. California*, 406 U.S. 813, 92 S.Ct. 1931, 32 L.Ed.2d 511 (1972); *Wilson v. Loew's, Inc.*, 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed.2d 519 (1958); *Fox Film Corp v. Muller, supra; Eustis v. Bolles*, 150 U.S. 361, 14 S.Ct. 131, 37 L.Ed. 1111 (1893).

For the foregoing reasons, this Court has no jurisdiction to review decisions based on state law where the nonfederal grounds are not so inextricably "interwoven" with federal grounds as "not to be an independent matter." Cf. *Herb v. Pitcairn, supra; Alton R. Co. v. Illinois Commerce Com.*, 305 U.S. 548, 59 S.Ct. 340, 83 L.Ed. 344 (1939); *Fox Film Corp. v. Muller, supra; Enterprise Irr. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 37 S.Ct. 318, 61 L.Ed. 644 (1917). The decision of the court of last resort in the state system is viewed as conclusive evidence of the state law on the subject involved. See. *Williams v. Kaiser, supra; Fox River Paper Co. v. Railroad Commission of Wis.*, 274 U.S. 651, 47 S.Ct. 669, 71 L.Ed. 1279 (1927); *Clarke v. Clarke*, 178 U.S. 186, 20 S.Ct. 873, 44 L.Ed. 1028 (1900); *Holmes v. Jennison*, 39 U.S. 540, 14 Pet. 540, 10 L.Ed. 579 (1840).

In the case at bar, the Kentucky Supreme Court determined in *Watson*, as a matter of state law, that it will not utilize scarce judicial energy in order to apply the *Chapman-Harrington* harmless-error rule to the *Taylor-Whorton* situation. This ruling is based on the state court's very real concern for the expeditious implementation of state rules and objectives relating to the presumption of innocence. Although it is evident that *Whorton* accurately applied this Court's decision as enunciated in *Taylor*, it is now equally clear that the automatic reversal of the conviction in *Whorton* is based on independent and adequate state grounds. As such, the question no longer presents a justiciable "case or controversy," and the Writ of Certiorari should be dismissed for lack of jurisdiction or mootness.

C. THE STATE COURT CORRECTLY APPLIED TAYLOR

In the majority opinion in *Whorton* by Chief Justice Palmore, the court noted that *Taylor* contains "no hint" as to the appropriateness of applying the *Chapman-Harrington* test to the present situation. However, the court also observed that although it may be desirable to hold "this newly-declared constitutional requirement" subject to the harmless error rule, "we are afraid it might not stick." In light of this viewpoint, the court read *Taylor* to mean that "when an instruction on the presumption of innocence is asked for and denied there is a reversible error."

The opinion in *Whorton* evidences a reluctance to circumscribe the decision in *Taylor* by speculating about the subjective reasons leading to this Court's opinion. The respondent shares this reluctance. Nonetheless, careful analysis of *Taylor* appears to disclose a clear intent of this Court to include the presumption of innocence among the basic components of a fair trial. Justice Brennan's concurring opinion in *Taylor* quotes *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), reaffirming the belief that "the presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice . . . It follows from this proposition, as is clear from the court's opinion, that trial judges should instruct the jury" on this presumption whenever such an instruction is requested. In addition, the majority opinion in *Taylor* treats the presumption of innocence as an "axiomatic and elementary" principle, the importance of which is not to be overlooked or underestimated. Furthermore, Justice Powell relied on the holding in

Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895), as a means of elucidating this Court's position. In *Coffin*, the Court recognized the presumption of innocence as a "fundamental principle," equally as weighty as the reasonable doubt standard. In *Taylor*, this Court appeared to view the *Coffin* principles with approval, and it proceeded to recognize several other factors which bear on the significance of this presumption. Specifically, this Court noted the "purging effect" of the instruction and the fact that the "ordinary citizen may draw significant additional guidance from an instruction."

The Kentucky Supreme Court correctly interpreted *Taylor* as establishing a constitutional principle of general applicability. However, since this Court did not specifically address the issue of the application of the harmless error rule in *Taylor*, the Kentucky Court concluded that this Court might have left open the applicability of the harmless error rule. On the basis of this interpretation, the state court then declined to play constitutional roulette with Whorton's due process rights and chose instead as a matter of state law not to apply a harmless error test in Kentucky. Because the state court correctly interpreted and applied *Taylor*, the result which it ultimately reached as a matter of state law is of no concern of this Court.

D. THE HARMLESS ERROR RULE IS INAPPLICABLE

A review of case law relating to harmless constitutional error establishes principles from which it may be readily seen that the failure to give a presumption of innocence instruction is not subject to the harmless error rule. In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), at 87 S.Ct. 828, the Court ratified earlier cases holding that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." In the footnote accompanying the text, the Court noted the following errors, which are so fundamental as to preclude a finding of harmless error: *Payne v. State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel), [reaffirmed in *Holloway v. Arkansas*, ___ U.S. ___, 98 S.Ct. 1173, ___ L.Ed.2d ___ (1978)]; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge).

In *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), the Court held that a denial of the right to confront a nontestifying co-defendant whose out-of-court statements were admitted into evidence was subject to the harmless error rule. However, the holding in *Harrington* appears to have been stripped of its vitality by the subsequent holding in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In *Davis*, defense counsel was not permitted on cross-examination to show that the prosecuting witness had a juvenile record which might have made him susceptible to prosecutorial influence. The court squarely held, at 94 S.Ct. 1111:

> Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and *no amount of showing of want of prejudice would cure it. Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314." *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968). (Emphasis added).

By this holding, the right of confrontation appears to have joined the other fundamental rights previously noted in *Chapman*. Thus, any constitutional right which affects the integrity and fundamental fairness of the proceedings is exempt from the harmless error rule. Unquestionably, the presumption of innocence is such a fundamental right.

Although the exact origin of the ancient and revered presumption of innocence is unknown, it has been traced to Athens, Sparta and Deuteronomy. Definitions of the presumption are understandably hazy. Nonetheless, it is generally described as a "conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty." *Coffin v. United States*, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895). In the United States, the concept of presumed innocence is predicated "not upon any express provision of the federal constitution, but upon ancient concepts antedating the development of the common law." *Reynolds v. United States*, 238 F.2d 460 (9th Cir. 1956).

In *United States v. Thaxton*, 483 F.2d 1071 (5th Cir. 1973), the court held that a presumption of innocence instruction was essential, since it served a two-fold

function:

> First as a corollary to the standard of proof in a criminal case, it serves to remind the jury that the prosecution bears the burden of persuading the factfinder of the defendant's guilt beyond a reasonable doubt such that in the absence of such proof that the jury must acquit. Second, it cautions that jury to put away from their minds all the suspicion that arises from the arrest, the indictment and the arraignment, and to reach their conclusion solely from the legal evidence adduced.

The second function of the instruction as stated above, is seen as a warning mechanism to combat the "inherent characteristic of human nature to assume that a person who is arrested is guilty of the crime with which he is charged." "Criminal Procedure—Presumption of Innocence," 24 Vanderbilt L. Rev 412 (March 1971).

Simon Greenleaf, an eminent nineteenth century legal scholar, found that the presumption is based on the belief that men do not usually commit crimes. In spite of the logic of this concept, it is probable that "observation of the entire pretrial criminal process involving the police, the legal forces of the state, and the investigation of the grand jury will create the natural suspicion that the accused is guilty." 1 Greenleaf, *Evidence* § 34 (7th ed. 1854). Therefore, the presumption of innocence, like a "great many presumptions, if not most, [is] rooted in a mixture of the two soils, probability on the one hand, independent procedural or social policy on the other." McCormick, "Charges on Presumptions and Burden of Proof," 5 North Carolina L. Review 291 (1927). This rationale leads to the conclusion that the positive statement of

the presumption should not be omitted from the jury instructions, since it acts as an important reminder to the jury. Cf. *United States v. Press*, 336 F.2d 1003 (2d Cir. 1964). The failure to tender an instruction on the presumption not only is an injustice to the due process rights of the accused, but it evidences a state of myopia which impairs the integrity of the judicial process.

In *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), the Court concluded that the right to a fair trial is a "fundamental liberty" secured by the Fourteenth Amendment. The presumption of innocence, "although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." See also *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). At a very early date, in *Coffin v. United States, supra*, the Court analyzed the exact issue presently under consideration. The Court therein held that the refusal to give the requested instruction was reversible error, and stated, at 156 U.S. 460:

> The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime.

Judge Wilhoit, in his *Taylor* dissent, also recognized that the value of the presumption of innocence diminishes where the trial court fails to properly educate the jury, when he stated, at 551 S.W.2d 814:

> There is certainly no such presumption in the minds of the jurors about to try a case. In fact, by the time the indictment is read to the jury the

> opposite presumption is likely to be present in their minds. The law builds in the presumption of innocence, but it is of no use to the defendant if the jury is never told about it.

Indeed, this viewpoint reflects the modern trend of cases in both state and federal courts which have continued to stress the crucial nature of this presumption.

In *Commonwealth v. Boyd*, 326 N.E.2d 320 (Mass. 1975), the court held that the function of this presumption is to emphasize to the jury that the finding of indictment grounds is not to be regarded as a circumstance tending to create unfavorable impressions against the accused. Courts must guard against factors which undermine the fairness of the fact-finding process and dilute the principle that guilt is to be established beyond a reasonable doubt. *State v. Tolley*, 226 S.E.2d 353 (N.C. 1976). The presumption of innocence must also be distinguished from the reasonable doubt standard, since each serves an independently significant function. *United States ex rel Castleberry v. Sielaff*, 446 F.Supp. 451 (D.C. Ill. 1978); *United States v. Lawson*, 507 F.2d 433 (7th Cir. 1974); *Holland v. United States*, 209 F.2d 516 (10th Cir. 1954); *Commonwealth v. Jones*, Pa.Super., 327 A.2d 638 (1974); J. Wigmore, *Evidence* (3rd ed. 1940) at 407.

In addition to the foregoing, there are several reasons for exempting specific errors from the harmless error rule. If a trial court commits mere evidentiary or procedural error, the record must be expected to contain sufficient information from which the impact of the error can be fairly assessed. By contrast, when an *error of omission* of the first constitutional magnitude

has occurred, the record simply does not contain an adequate basis for determining the impact of the error. For example, in *Holloway v. Arkansas, supra*, the same attorney represented multiple defendants. The potential for a conflict of interest was held to render his assistance ineffective, even though no actual ineffectiveness appeared on the record. Indeed, any other holding would have required the reviewing court to engage in speculations about the subjective mental state of the attorney. See also *Gideon v. Wainwright, supra*, in which the impossibility of determining the effect of the denial of counsel was noted.

The same practical impediment to the application of the harmless error rule in cases where the right to counsel has been denied also exists in the other classes of cases which have been exempted from the rule. In *Davis v. Alaska, supra*, the Court appears to have recognized the impossibility of attempting to predict the impact on the jury which defective confrontation and cross-examination might have had. Similarly, in *Payne v. Arkansas, supra*, the Court refused to speculate on the impact which a coerced confession might have had on the jury. Again, in *Tumey v. Ohio, supra*, the Court adopted a prophylactic rule in order to avoid inquiring into the subjective mental state of a judge with a financial interest in the litigation.

It is obvious that the same impediment to the application of the harmless error rule exists whenever a presumption of innocence instruction is denied. In order to assess the potential impact of the required instruction, a reviewing court would have to engage in considerable speculation about the attitudes of the jurors toward the presumption of innocence. The

reviewing court would have to speculate about the thought processes of the jurors and their discussion during the course of the deliberation. Such speculation vitiates the very reasonable doubt standard which gives rise to the presumption of innocence.

In *Braley v. Gladden*, 403 F.2d 858 (9th Cir. 1968), the court discussed the importance of the presumption of innocence instruction and noted that, while the jury is required to presume the accused is innocent until he is proved guilty, the court also presumes that the jury applies *only* that law of which it is informed by the judge. See also *People v. Hill*, Colo., 512 P.2d 257 (1973). In *Braley*, the court concluded that, regardless of the state of the evidence, an instruction is required. The court further stated, at 403 F.2d 861:

> The presumption of innocence is not merely a papier-mache figure for dramatic display in the courtroom; it is a reality without which trials become mere playacting with the verdict residing in the judge's pocket before the jury is sworn. Even if in an hypothetical case, the evidence of guilt piles as high as Mt. Everest on Matterhorn, even if the District Attorney conscientiously believes the defendant to be as guilty as Cain, and no matter with what certainty the Judge views the culpability of the accused at the bar, the defendant is still entitled to all the safeguards of a fair trial as announced in the Constitution, and the law of the land.

An overview of state decisions which have dealt with the question of whether a presumption of innocence instruction should be given appears to indicate approval of the *Taylor* decision. The gravity with which the state courts perceive the presumption of innocence

is illustrated in several cases: In *Williams v. State*, Ark., 535 S.W.2d 842 (1976), the court stated that the "presumption of innocence alone puts in issue the truth and credibility of all the evidence offered against the accused." In *People v. Weinstein*, Ill., 220 N.E.2d 432 (1966), the court declared that the presumption is founded upon "first principles of justice" and is intended not to protect the guilty but to prevent, so far as human agencies can, conviction of the innocent. Moreover, the presumption "cloaks citizens from birth to death." *State v. Rosen*, Mich.App., 171 N.W.2d 488 (1969). See also *Commonwealth v. Mayhugh*, 233 Pa.Super. 24, 336 A.2d 379 (1975). The presumption is viewed as an uncalled witness for the defense and it disappears only upon guilt proved beyond a reasonable doubt. *Halquist v. State*, Tex., 489 S.W.2d 88 (1972).

Other state courts have described the presumption of innocence in the following terms: "essential element of a fair trial," *Commonwealth v. Davis*, Pa., 351 A.2d 642 (1976); "foundation for our system of criminal justice," *People v. Kanan*, Colo., 526 P.2d 1339 (1974); "basic part of organic law," *Hill v. State*, Fla.App., 209 So.2d 689 (1968).

A number of federal courts have also recognized that the presumption of innocence instruction is anecessary component of due process. See: *United States v. Fernandez*, 496 F.2d 1294 (5th Cir. 1974); *United States v. Pepe*, 501 F.2d 1142 (10th Cir. 1974); *United States ex rel. Campagne v. Follette*, 306 F.Supp. 1255, *affirmed*, 419 F.2d 833 (D.C.N.Y. 1969), *cert. denied* sub nom. *Campagne v. Follette*, 400 U.S. 834, 91 S.Ct. 69, 27 L.Ed.2d 66 (1970); *McDonald v. United States*, 284 F.2d 232 (D.C. Cir. 1960).

Thus, it now appears to be the majority view that the failure to give a requested instruction on the presumption of innocence creates an error of constitutional dimension which requires automatic reversal. See *Ealey v. State*, Ga.App., 232 S.E.2d 620 (1977); *State v. McHenry*, Wash., 558 P.2d 188 (1977); *State v. Cokeley*, W.Va., 226 S.E.2d 40 (1976); *People v. Donald*, 21 Ill.App.3d 696, 315 N.E.2d 904 (1974); *People v. Vann*, 115 Cal.Rptr. 352, 524 P.2d 824 (1974); *People v. Hill*, 512 P.2d 257 (1973); *Whaley v. Commonwealth*, Va., 200 S.E.2d 556 (1973); *State v. Henderson*, N.M.App., 466 P.2d 116 (1970).

In the case at bar, the petitioner seeks to have this Court limit *Taylor* to its facts, thereby avoiding the repercussions of a due process application of *Taylor* in every case. Alternatively, the Attorney General suggests that, even if *Taylor* is found to have enunciated a constitutional principle of general applicability, it should be limited by the *Chapman-Harrington* rule. This position not only demonstrates a myopic view of the fundamental social policy which underlies *Taylor*, but also serves as an impediment to the state court's express interest in judicial economy. Either argument proposed by the petitioner would necessitate the use of "mental gymnastics" sought to be averted by the state court. If the presumption of innocence is only constitutionally required in exceptional cases, then each case must be scrutinized thoroughly in order to ascertain whether extraneous circumstances exist which would activate the implementation of *Taylor*. On the other hand, if the harmless-error rule is to be applied, the court must go through the similar exercise of determining if the case is within the rule or not. This

creates the precise situation which the Kentucky Supreme Court seeks to circumvent. In view of the court's amending of RCr 9.56, the opinion in *Whorton* and the subsequent decision in *Watson*, there is little else the state court can do to establish its position on this subject. It has wisely avoided the pitfalls inherent in any attempt to apply the harmless error rule. This Court should do likewise.

E. THE ERROR WAS NOT HARMLESS

Even if it is assumed that the failure to give an instruction on the presumption of innocence might sometimes be harmless, it was not harmless in the case at bar. The state court opinion in *Whorton* reflected this viewpoint when it stated: "We know that in actuality Taylor was no more 'prejudiced' in his case than Whorton was in this one." Additionally, the fact that Whorton sought to separate the guilt and punishment phases of the trial, so that he would be able to present mitigating circumstances in the latter, demonstrates his compelled reliance on the presumption of innocence. Moreover, the fact that all three indictments were tried jointly, despite Whorton's motion to elect and sever, also forced him to heavily rely on the weight which the presumption would have with the jury. In order to present evidence in mitigation, or to present a defense to two of the three indictments, Whorton would have had to forego his right to remain silent on the question of guilt under the third indictment. The fact that the trial court refused the motions to bifurcate and to sever caused Whorton

to rely more heavily on the presumption of innocence than he might otherwise have done. Having made a difficult election between constitutional rights, he should at least have been given the full benefit of his election.

Another reason why the error cannot be considered to be harmless in the case at bar stems from the voluminous and complicated nature of the proceedings. Whorton was charged with fourteen separate offenses. The jury was required to sort through twenty separate instructions and thirty-two form verdicts. Under Kentucky law, the instructions are read to the jury before closing arguments, and counsel is limited to applying the law contained in the instructions to the facts of the case. This does not mean that counsel may not argue for the presumption of innocence, but it does mean that the jury knows that his argument is not based upon the law recognized by the trial court. The order of proceedings also means that the trial judge cannot make an individualized decision whether the arguments of counsel heighten the need for the instruction. Under these circumstances, it should not be assumed that the jury carried the presumption of innocence into its deliberations. To the contrary, the submission of such a voluminous case to the jury without an instruction on the presumption of innocence creates a likelihood that the jury will adjudicate factual guilt on one or two charges and then presume the defendant to be guilty of the others. This pyramiding affect is also likely to promote the imposition of stiffer penalties than the jury might have imposed if it had convicted the defendant of only some of the offenses. Inded, in the case at bar, the jury convicted Whorton of every offense and recommended

the maximum penalty for each one. For these reasons also, the failure to give a requested instruction cannot be treated as harmless in the case at bar.

CONCLUSION

The respondent respectfully requests that the Writ of Certiorari should be dismissed for lack of jurisdiction or mootness on the basis of the Kentucky Supreme Court's recent decision in *Watson v. Commonwealth*. If this Court does not find *Watson* dispositive of this case, then the judgment of the Supreme Court of Kentucky reversing the conviction of Harold Whorton should be affirmed in accordance with *Taylor v. Kentucky*.

/s/
TERENCE R. FITZGERALD
Chief Appellate Defender of the
Jefferson District Public Defender
200 Civic Plaza
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Respondent

/s/
PAUL G. TOBIN
Jefferson District Public Defender
of Counsel